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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER KASEBERG,

Plaintiff,

v.

CONACO, LLC; TURNER  
BROADCASTING SYSTEM; TIME  
WARNER, INC.; CONAN O'BRIEN;  
JEFF ROSS; MIKE SWEENEY; DOES  
1-50, inclusive,

Defendants.

CASE NO.: 15-CV-01637-JLS-MSB

Hon. Janis L. Sammartino

**DEFENDANTS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION IN  
LIMINE NO. 1 FOR SEPARATE  
TRIALS ON THE ISSUES OF  
LIABILITY AND DAMAGES OR,  
IN THE ALTERNATIVE, FOR AN  
ORDER CLOSING THE  
COURTROOM AND SEALING  
DOCUMENTS DURING  
TESTIMONY ABOUT  
DEFENDANTS' CONFIDENTIAL  
FINANCIAL INFORMATION**

Date: April 11, 2019

Time: 1:30 p.m.

Courtroom: 4D

1 Defendants Conaco, LLC; Conan O'Brien; Jeff Ross; Mike Sweeney; Turner  
 2 Broadcasting System, Inc.; and Warner Media, LLC as successor-in-interest to Time  
 3 Warner Inc. (collectively "Defendants") hereby submit this memorandum of points  
 4 and authorities in support their Motion *in Limine* No. 1 for Separate Trials on  
 5 Liability and Damages or, in the Alternative, to Seal Documents and Close the  
 6 Courtroom During Presentation of Confidential Material as follows:

7 Under the strong protective order entered by this Court, *see* ECF No. 48,  
 8 Defendants have produced dozens of pages of highly confidential financial  
 9 information to Plaintiff. This is especially true for Defendants Conaco and Turner  
 10 (collectively the "Corporate Defendants"): indeed, these Corporate Defendants have  
 11 produced financial records that are confidential even to each other. Public  
 12 dissemination of this financial information would cause considerable harm to the  
 13 Corporate Defendants' competitive standing by allowing their competitors to access  
 14 sensitive, nonpublic information regarding revenues, costs, profitability, and  
 15 advertisers. Accordingly, Defendants' interest in maintaining the confidentiality of  
 16 this nonpublic financial information would likely outweigh the common law right to  
 17 public access to judicial proceedings, necessitating the closure of the courtroom and  
 18 sealing of documents and transcripts.

19 Before reaching the question of closing the courtroom, however, Defendants  
 20 propose, and move for an order, separating the liability and damages phases of the  
 21 trial scheduled for May 28, 2019. Under Federal Rule of Civil Procedure 42, the  
 22 Court has the discretion to order separate trials "[f]or convenience, to avoid prejudice,  
 23 or to expedite and economize ...." While Rule 42 "confers broad discretion upon the  
 24 district court to bifurcate a trial," *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080,  
 25 1088 (9th Cir. 2002), all three factors listed in Rule 42 favor bifurcation in this case.

26 Regarding convenience, as discussed above, the financial information  
 27 underlying the damages calculations in this case is highly confidential. The courtroom  
 28 would likely need to be closed during any testimony about damages. *See Kamakana*

1 *v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (“In general,  
 2 ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and  
 3 justify sealing court records exist when such ‘court files might have become a vehicle  
 4 for improper purposes,’ such as the use of records to ... release trade secrets.”  
 5 (quoting *Nixon v. Warner Commc ’ns, Inc.*, 435 U.S. 589, 598 (1978))). Of course, if  
 6 the trial is bifurcated, this administrative headache could be avoided altogether in the  
 7 event of a defense verdict. Even in the event that Plaintiff prevails on some causes of  
 8 action, bifurcation would provide for a streamlined process: Defendants anticipate  
 9 that nothing would need to be sealed or closed during the liability portion, and  
 10 damages could be tried in a consolidated sealed proceeding afterward—likely  
 11 requiring only one or two days of testimony, as opposed to closing and opening the  
 12 courtroom multiple times during a unified trial, each instance of which is likely to be  
 13 a time-consuming distraction.

14 On prejudice, bifurcation may also help avoid prejudice to the Defendants.  
 15 Under 17 U.S.C. § 504, “[i]n establishing the infringer’s profits, the copyright owner  
 16 is required to present proof only of the infringer’s gross revenue, and the infringer is  
 17 required to prove his or her deductible expenses and the elements of profit attributable  
 18 to factors other than the copyrighted work.” Defendants anticipate that Plaintiff will  
 19 seek disgorgement of profits for at least the Tom Brady Joke and Washington  
 20 Monument Joke. Plaintiff’s own purported financial expert, John H. Reith, has opined  
 21 that the revenues attributable to each of the Jokes at Issue are in the range of mid-four  
 22 figures.<sup>1</sup> See Declaration of Thomas P. Burke, Jr. (“Burke Decl.”), ¶ 3. Defendants,  
 23 meanwhile, counter that it is impossible to attribute *any* particular amount of revenue  
 24 to the Jokes at Issue, given that Plaintiff cannot offer any evidence that any of

25 \_\_\_\_\_  
 26 <sup>1</sup> Given the sensitive and highly confidential nature of the underlying data,  
 27 Defendants do not cite the exact figures calculated by Reith at this time, though if  
 28 determined to be material to the outcome of this Motion, Defendants can make  
 Reith’s report available for *in camera* inspection or under seal.

1 *Conan*'s estimated revenue<sup>2</sup> streams were enhanced by the alleged infringement.  
 2 Regardless, the overall conclusion remains that we are not dealing with large damages  
 3 figures. However, should Plaintiff attempt to elicit testimony from Conaco or Turner  
 4 of gross revenues or budgets for the show, the large figures involved could  
 5 irreversibly prejudice the jury in a unified trial. Avoidance of this potential prejudice  
 6 favors bifurcation.

7 And regarding economy, a bifurcated trial is likely to be conducive to  
 8 expedition and economy. Of course, in the event of a complete defense verdict, there  
 9 will be no need to conduct the damages portion of the trial. But even in the event that  
 10 Plaintiff is able to prove infringement for some or all of the Jokes at Issue, the  
 11 damages portion of the trial still may not be necessary—such a verdict on liability  
 12 would likely drive settlement of the damages portion. Even if a damages trial does  
 13 take place, however, the issues may be narrowed so that the damages evidence can be  
 14 presented more quickly, and be more clearly understood, than in a unified trial. For  
 15 example, only one of the Jokes at Issue (the Jenner Joke) is eligible for statutory  
 16 damages. It is possible that the jokes remaining for a damages trial will only be  
 17 eligible for actual damages and disgorgement of profits, on the one hand, or statutory  
 18 damages, on the other. If only one computation of damages is available, that would  
 19 streamline the testimony greatly.

20 Finally, the issues of liability and damages are clearly separable in this case.  
 21 *See Bates v. United Parcel Serv.*, 204 F.R.D. 440, 448 (N.D. Cal. 2001) (including  
 22 “separability of the issues” as a factor be considered when determining whether to  
 23 bifurcate a trial) (citing William W. Schwarzer, et al., *Federal Civil Procedure Before*  
 24 *Trial* § 16:160.4). The liability phase will be marked by testimony from Plaintiff,

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 26 <sup>2</sup> As Defendant Turner explained in its Second Amended Supplemental Interrogatory  
 27 Responses, it can only provide estimates of its revenues and profits “as TBS does not  
 28 keep episode-specific information sufficient to arrive at precise revenue and profit  
 figures in the ordinary course of business.” Burke Decl., ¶ 2, **Ex. 1** at 6.

1 from the writers of the Jokes at Issue, from the named individual Defendants, and  
 2 possibly from expert witnesses David Barsky and Elayne Boosler (for Plaintiffs, and  
 3 the subject of Defendants' Motions *in Limine* Nos. 2 and 3) and Jeffrey Kinrich (for  
 4 Defendants). The issues of access and independent creation are likely to  
 5 predominate—and these do not overlap with damages issues. On Plaintiff's side,  
 6 likely the only repeated witness in a damages trial would be the Plaintiff himself—  
 7 and then, only for the limited purpose of proving up his actual damages. Plaintiff's  
 8 expert John H. Reith is concerned exclusively with damages issues. And Defendants'  
 9 witnesses are likely to include testimony from a corporate representative of Conaco,  
 10 along with rebuttal expert testimony from Kinrich. While some witnesses *may* be  
 11 required to appear and testify twice, it is relatively few, and the subjects of their  
 12 testimony are easily separable. Accordingly, this factor favors bifurcation.

13 Additionally, as a matter of practicality and scheduling, the key witness  
 14 designated as “person most knowledgeable” for Defendant Turner, Ayesha Kardar,  
 15 will be unavailable to testify during the dates currently scheduled for trial in this  
 16 matter due to a planned leave of absence for maternity leave. *See* Declaration of  
 17 Ayesha Kardar, ¶ 3. Bifurcation will relieve the Court and the parties from the burden  
 18 of either having to accommodate Kardar's availability or relieve Defendant Turner  
 19 from the burden of designating and preparing a substitute witness.

20 For the foregoing reasons, Defendants respectfully request that the Court grant  
 21 this Motion and order separate trials on the issues of liability and damages or, in the  
 22 alternative, issue an order closing the courtroom and sealing all documents and  
 23 transcripts during testimony related to Defendants' nonpublic financial information.

1 DATED: March 7, 2019

Respectfully submitted,

2 GLASER WEIL FINK HOWARD  
3 AVCHEN & SHAPIRO LLP

4 By: /s/ Thomas P. Burke Jr.

5 PATRICIA L. GLASER

6 THOMAS P. BURKE JR.

7 JUSTIN P. THIELE

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